Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1259

CENTRAL MACHINE & TOOL COMPANY, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FRANK CARTER
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Enid, Oklahoma
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April, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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CASES:

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U. S. ex rel. Castro-Louzan v. Zimmerman (D.C. Pa. 1950), 94 F.Supp. 22 5-6

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Fifth Amendment: "No person shall * * * be deprived of * * * property without due process of law." 6

CASES IN POINT*

Albany City Nat. Bank v. Maher (C.C.N.Y. 1882), 9 F. 884.

Bascom v. Industrial Accident Commission of California (1938), 77 P.2d 305, 25 Cal.App.2d 334.

Boddie v. Connecticut (Conn. 1971), 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed.2d 113.

Breithaupt v. Abram (N.M. 1957), 77 S.Ct. 408, 352 U.S. 432, 1 L.Ed.2d 448.

Gray v. Whitmore (1971), 94 Cal.Rptr. 904, 17 C.A.3d 1.

Howard Sports Daily v. Weller (1941), 18 A.2d 210, 179 Md. 355.

Kwong Hai Chew v. Colding (N.Y. 1953), 73 S.Ct. 472, 344 U.S. 590, 97 L.Ed. 576.

National Labor Relations Board v. Phelps (C.C.A. 5, 1943), 136 F.2d 562.

National Labor Relations Board v. Prettyman (C.C.A. 1941), 117 F.2d 786.

Orcutt v. Crawford (C.C.A. Wyo. 1936), 85 F.2d 146, certiorari denied 57 S.Ct. 119, 299 U.S. 594, 81 L.Ed. 437.

Pittsburgh, etc., R. Co. v. Backus (Ind. 1894), 14 S.Ct. 1114, 154 U.S. 421, 38 L.Ed. 1031.

Pullman Co. v. Suttles (1938), 199 S.E. 821, 187 Ga. 217.

* Not cited in brief.

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OCTOBER TERM, 1971

No. ----------

CENTRAL MACHINE & TOOL COMPANY, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Central Machine & Tool Company, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on January 4, 1972.

OPINIONS BELOW

The court did not render any opinion on the issue involved herein, but rendered a Supplemental Judgment, dated January 4, 1972, a copy of which is hereto attached and marked Appendix A.

JURISDICTION

As indicated above, the judgment of the Court of Appeals was entered January 4, 1972. A Motion to Modify the Decree was denied on March 3, 1972. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. 1254 (1).

QUESTION PRESENTED

Whether or not the National Labor Relations Board may arbitrarily determine and assess alleged back-pay amounts without evidence and without a hearing, and without affording Petitioner an opportunity to appear and be heard?

STATEMENT

Petitioner is a small machine shop operation in Enid, Oklahoma.

In Case No. 411-69, the Circuit Court had held that Petitioner had improvidently terminated five employees, and directed that they be reinstated with backpay.

Petitioner, pursuant to said Decree, offered them reinstatement. One of them accepted and exonerated Petitioner from any improper motives when he had been previously terminated.

Thereupon, the Regional Director and his staff made an arbitrary determination of certain back wages alleged to be due, in the total amount of $37,555.62, with interest, even including the employee who had returned to work, with no claim to back pay.

The specifications were set for hearing by the Director for June 28, 1971, at Enid, Oklahoma, in the Federal Courtroom.

In the meantime, the employees involved were scattered over the country; and Petitioner was confronted with the herculean task of determining where they had been working; for whom they had been working; how much they had been paid; the nature and extent of their interim physical disabilities and the extent of their efforts to obtain similar local employment.

Petitioner was finally able to assimilate the necessary information by the ninth of June, and so notified the Regional Director and the Board that it would be ready for the hearing on June 28.

But notwithstanding the diligent and faithful efforts of this Petitioner to prepare for said hearing, the hearing date of June 28 was abruptly and arbitrarily cancelled by the Board and the Regional Director and has never been reset; and this Petitioner has never had an opportunity to present its evidence which, in its opinion, would reveal that instead of being indebted to the extent of $37,555.62 for back pay, it would only be obligated to the extent of approximately $1,334.41.

After having made constant overtures and requests to the National Labor Relations Board to assign another date for a hearing, but without success, this Petitioner thereupon assumed the initiative, and filed with the Circuit Court in Case 411-69, its motion to require the Board to conduct a hearing for the determination of back pay. This motion was filed November 19, 1971.

In the meantime, the Board had made an arbitrary determination, implemented by an Order, and without any hearing whatever, determining this Petitioner to be indebted and obligated to the five employees in the total amount of $37,555.62.

After Petitioner had filed its motion in the original case, requesting the court to direct the Board to conduct a hearing on said back pay specifications, the National Labor Relations Board then filed its Petition with the court for enforcement of its Order in a new case, No. 71-1715.

The two cases were then consolidated by the court.

The National Labor Relations Board sought summary judgment, which was granted by the court, and which is exemplified in the Supplemental Decree hereto attached and marked Appendix A.

At no time has this Petitioner been able to procure and obtain a hearing on the back pay specifications, in spite of its many formal and informal requests.

ARGUMENTS AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The *right to a hearing* is inherent under the Constitution.

This is true regardless of the foibles, manipulations or any other arbitrary decision by a governmental board or a governmental employee.

As was stated in *The Goodwill Station* v. *Federal Communications Commission* (1948), 174 F.2d 226, 84 U.S.App. D.C. 1, 337 U.S. 265, 93 Law Edition, 1353:

> "The due process guaranty of hearing is a *right* in persons, *not* a privilege to be extended to persons according to the ex parte judgment of tribunals as to whether or not there should be a hearing." (Italics ours.)

Petitioner had the *right* to a hearing. It was ready. It importuned the Director and the Board to reinstate its hearing date, or to set another. They did not do so. It voluntarily requested the court to require the Board to designate a hearing date and to hold a hearing. It declined to do so.

The arbitrary determination by the Board as to the back pay amount due was decided without a hearing.

This was in clear contravention to the case of *Pittsburgh S.S. Co.* v. *NLRB* (C.C.A. 6, 1948), 167 F.2d 126 (*Reversed* on other grounds), 69 Supreme Court 1283, 337 U.S. 656, 93 Law Edition 1602, wherein the Court said:

> "To constitute due process in administrative proceedings, the one who decided *must hear.*" (Italics ours.)

To the same effect:

> "Procedural 'due process' requires that a *hearing* be accorded at some stage of an administrative proceeding." *Direct Realty Co.* v. *Porter* (1946), 157 F.2d 434. (Italics ours.)

The mere fact that the National Labor Relations Board is an administrative body, does not insulate it from the requirements of the Fifth Amendment to the Constitution of the United States. For instance, it was stated in *U. S.*

ex rel. Castro-Louzan v. *Zimmerman* (D.C. Pa. 1950), 94 F.Supp. 22, that:

> "Guaranty of due process of law requires a full and fair hearing, even before an administrative tribunal."

As a matter of fact, the National Labor Relations Board should have been aware of the impact of the Fifth Amendment as indicated by a case in which it was involved before the Fifth Circuit [*NLRB* v. *Phelps* (C.C.A. 5, 1943), 136 F.2d 562], when the Court said:

> "A fair trial by an unbiased and non-partisan trier of facts is of the essence of the judicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge."

Whatever reasons the Board, or the Director, may have had in arbitrarily cancelling the hearing, and precluding the opportunity of Petitioner to personally appear at such hearing, could not possibly be sufficient to enable them to ignore the "due process" clause of the Constitution. "Due process" means fair play. As indicated in the California case of *People* v. *Tilkin* (1939), 90 P.2d 148, 34 Cal.App.2d 743:

> " 'Due process' is not a yardstick of definite value but is an embodiment of the English sporting idea of fair play."

Regardless of whatever self-made formula, or mechanical crutch the Board may have relied upon, in denying this Petitioner a hearing, it would be too infinitesimal and insufficient to impinge upon or supersede the inherent rights of this Petitioner under the Fifth Amendment to the Constitution of the United States to a hearing.

An evidentiary *hearing* is all that is requested and desired by this Petitioner. It will abide by the final outcome thereof; but at least it will have had the opportunity to cross-examine witnesses, to introduce its own witnesses, and to submit its position to the Examiner and the Board.

Any lesser remedy would not only erode, but completely erase the inherent rights of this Petitioner in this case, under the Constitution of the United States.

Perhaps to a lesser degree, but nevertheless equally important to this Petitioner, whose resources are extremely small, this case reminds one of the arbitrary procedures utilized by the "Hanging Judge" in Fort Smith, Arkansas, and the Judge "West of the Pecos." As tradition has it, they would take evidence against a man, in absentia, and sentence him to death. If and when he was found, he would be brought in to the public square and summarily hanged, without any further trial or hearing.

By analogy—although it is presently, and has always, insisted on a hearing—this is what could happen economically to this Petitioner in the event no relief should be afforded by this Court.

Respectfully submitted,

FRANK CARTER
Bass Building
Enid, Oklahoma
Counsel for Petitioner

of Counsel:
OTJEN & CARTER
Bass Building
Enid, Oklahoma

April, 1972

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing application was this day mailed with postage prepaid to:

General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D. C. 20570

Mr. Elmer Davis, Regional Director
National Labor Relations Board
Room 8A24, Federal Office Building
819 Taylor Street
Fort Worth, Texas 76102

FRANK CARTER

Dated this 1st day of April, 1972.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner,	)	
v.	)	Nos. 411-69 71-1715
CENTRAL MACHINE AND TOOL WORKS Respondent.	)	

SUPPLEMENTAL JUDGMENT

Before:

This court having on May 19, 1970, and August 6, 1970, respectively, entered its judgments enforcing orders of the National Labor Relations Board, which directed, among other things, that Respondent make whole five named employees for their losses resulting from the Respondent's discrimination against them, and the Board having thereafter applied to this Court for summary entry of a supplemental judgment specifying the amounts of backpay due:

IT IS HEREBY ORDERED AND ADJUDGED that the Respondent, Central Machine and Tool Works, its officers, agents, successors, and assigns, shall pay to the employees named below the amounts set opposite their names, plus interest accrued at the rate of 6 percent per annum to the date of payment, minus the tax withholdings required by Federal and State laws:

Clinton M. Alexander	$ 14,875.68
Robert A. Lucas	11,473.44
Leslie G. Ragoss	610.89
Kenneth G. Warren	5,695.69
Arthur L. Willett	4,899.92

[APPENDIX]

/s/ DAVID LEWIS
Judge, United States Court of
Appeals for the Tenth Circuit

A true copy

DATED: January 4, 1972

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By
/s/ HEIDE BARTHEL
Deputy Clerk